

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

FIDELITY NATIONAL FINANCIAL, .
INC., ET AL., .
Plaintiffs, . Docket
v. . No. 09-cv-0140-GPC-KSC
September 25, 2015
1:30 p.m.
NATIONAL UNION FIRE INSURANCE .
COMPANY OF PITTSBURGH, PA, .
ET AL., .
Defendants. . San Diego, California
.

TRANSCRIPT OF HEARING RE OBJECTION TO MAGISTRATE ORDER
BEFORE THE HONORABLE GONZALO P. CURIEL
UNITED STATES DISTRICT JUDGE

A-P-P-E-A-R-A-N-C-E-S

For the Plaintiffs:

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1 SAN DIEGO, CALIFORNIA; SEPTEMBER 25, 2015; 1:30 P.M.

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3 THE CLERK: Number 16 on calendar, case 09-cv-0140,
4 Fidelity National Financial, Inc., v. National Union Fire
5 Insurance Company, for a Hearing on Objections to the
6 Magistrate Order, Docket 460.

7 THE COURT: Appearances, please.

8 MR. DAVISSON: Good afternoon. Michael Davisson for
9 National Union.

10 THE COURT: Good afternoon.

11 MR. GOLDFARB: Good afternoon, Your Honor. Steve
12 Goldfarb and Rupa Singh for the Plaintiffs, Fidelity and
13 Chicago Title.

14 THE COURT: Good afternoon to you all.

15 We are here on a Hearing Regarding Objections to
16 Magistrate Order Document 460. I have reviewed the operative
17 order, the pleadings. And just to give you a sense of how I
18 see the case, at this point, we have a trial that's limited to
19 the issue of damages, that we are looking forward to. With
20 respect to the issues, there are questions regarding bad faith
21 claims handling, and with respect to that issue, Dean Felton
22 was the designated expert that the defense had chosen, had
23 relied upon, and there was extensive discovery relating to his
24 work. Unfortunately, due to no fault of National Union,
25 Mr. Felton is not available. So at this time, the question is

1 whether or not the defense should be permitted to replace
2 Mr. Felton with a substitute.

3 There are a number of questions that have been presented
4 to Judge Crawford and to this Court regarding the timeliness of
5 the notice that was provided by the defense regarding the
6 unavailability of Felton, the diligence of the defendant in
7 reporting the unavailability of Mr. Felton, and the effect that
8 it would have on the case if a substitute expert were permitted
9 to enter at this time.

10 I share a number of the concerns of Judge Crawford as to
11 the timing, the lack of diligence; at the same time, I also am
12 not clear as to the level of prejudice that would be created by
13 permitting a substitution of the expert at this stage.

14 I do recognize what the Magistrate, what the Plaintiffs,
15 were concerned about, as far as some possible gamesmanship,
16 some last-second reconfiguring of the Defendant's case, and I
17 share those -- some of those concerns. But in my view, the
18 question is can those concerns be sufficiently addressed in
19 some reasonable fashion. And it seems to me that, as a
20 starting point, that the best means to make that determination
21 would be to review, consider, the report of the substitute
22 expert.

23 And as I understand it, such a report exists; is that
24 true?

25 MR. DAVISSON: Of the substitute, Your Honor?

1 THE COURT: Yes.

2 MR. DAVISSON: It does, Your Honor.

3 THE COURT: And as I understand it, it has existed
4 since around June?

5 MR. DAVISSON: I don't know when it was finalized, to
6 be honest. That sounds about right.

7 THE COURT: And we are now three months later, in
8 September. And as I understand it, that report has not yet
9 been furnished or provided to the plaintiffs. Is that also
10 true?

11 MR. DAVISSON: That's also true, Your Honor.

12 THE COURT: So my concern is that without an
13 opportunity to review that particular report, we are just kind
14 of talking about hypotheticals, whether or not there are new
15 opinions, that they are ones that are configured to avoid the
16 Court's *Daubert* order, or ones to somehow or another improve
17 the chances of the Defendant's prevailing or reducing the
18 amount of damages.

19 So it strikes the Court that before we could really have
20 an intelligent conversation about prejudice, before we can have
21 a full record for appeal, we would want that -- if not on the
22 record, to be furnished to the Plaintiff; the Plaintiff have an
23 opportunity to review it, consider it, and then report back as
24 to how and why that report creates any additional prejudice,
25 how it creates the specter or the likelihood that we will

1 encounter the problems that are noted by Judge Crawford. And
2 those include the possibility reopening of expert discovery,
3 even fact discovery, the possible rise to renewed motions for
4 summary judgment. It seems to me that we are not really in a
5 position to make those determinations without that report being
6 shared. And again, I am surprised, I am disappointed, that it
7 requires for this matter to be presented to me for this to even
8 become something to talk about.

9 So rather than go through all of this today, what I am
10 going to do is I am going to direct the defense to furnish, by
11 the close of business, a copy of this report by the substitute
12 expert, and then I am going to give the plaintiffs an
13 additional period of time to review this report and then to get
14 back to the Court as to why, in their estimation, it provides
15 further indication of prejudice or of gamesmanship.

16 Because the way I see it, if we could assure ourselves
17 that essentially the substitute expert would parrot the
18 opinions that have been provided by Mr. Felton -- and I believe
19 initially there were 13 opinions, and the *Daubert* order
20 addressed some of those opinions -- unless we have assurances
21 that we are going to be limited to those opinions, then we will
22 have a problem. If we can limit ourselves to that, I would be
23 inclined to say let's get moving. We are going to be set for
24 trial in January. I think we are set for January.

25 MR. GOLDFARB: January 11, Your Honor.

1 THE COURT: And given the turnaround with respect to
2 the original designation of experts, the original expert
3 reports were to be exchanged July 15, 2011. Expert discovery
4 was to be concluded September 9, less than two months later. I
5 think we have enough time, possibly, as long as, in fact, we
6 are in a position to limit ourselves to those opinions of Dean
7 Felton.

8 So with that being the case, let me ask, would two weeks
9 be sufficient time for the Plaintiffs to fully review,
10 consider, and then respond to what is being offered by the
11 defense?

12 MR. GOLDFARB: Your Honor, the answer in the abstract
13 as to whether two weeks is enough time, the answer is a simple
14 yes. The answer in the context of will we also be preparing
15 motions in limine during that time period, proceeding with our
16 trial preparation, the answer is no. That is the issue.

17 THE COURT: And I expect that, given the number of
18 lawyers that have been identified as being involved in this,
19 that, number one, motions in limine are being prepared right
20 now as we speak; and number two, there are lawyers who probably
21 have been the ones designated to prepare certain motions in
22 limine because they have been limited.

23 MR. GOLDFARB: No. Half the list is not involved
24 with the case anymore, and we are down from a large number of
25 people working on trial preparation to the people that are

1 going to be involved in the trial and with the knowledge of all
2 the specific issues. The key people that are involved, the
3 three or four people that are really focusing on the case, are
4 all working on the motions in limine, are all involved in the
5 expert.

6 But if I could potentially just address the issue you
7 raised. I certainly appreciate it and I would just at least
8 suggest and ask that you consider whether or not you do in fact
9 have a full record to consider this. I mean, from our
10 perspective, the reason that you don't have the report to
11 review is because the defendant didn't want to provide that
12 because it would provide the evidence of exactly what we have
13 said and what the Magistrate Judge found.

14 THE COURT: And maybe that's true.

15 MR. GOLDFARB: But here, the proof is already in the
16 pudding, Your Honor. On the last page of the Magistrate
17 Judge's order, she suggested that she was not intending to
18 foreclose the possibility that the Court might permit National
19 Union to present Mr. Felton's remaining opinions and testimony
20 through a stand-in live witness who is strictly limited to
21 Mr. Felton's opinions.

22 THE COURT: Those opinions are as revealed during
23 cross-examination of Mr. Felton?

24 MR. GOLDFARB: But there can only be prejudice by
25 whatever the substitute does other than saying he is going to

1 adopt and -- adopt and take over Mr. Felton's opinions and his
2 report and be a stand-in, because his opinions, the 13
3 opinions -- they are what they are. We don't need him to have
4 a report to say that. He could simply adopt Mr. Felton's
5 report, if that's what he wanted to do.

6 We know from the meet-and-confer and what the Defendant
7 has said over the last four and a half months that that isn't
8 what they want to do. They have made it crystal clear that
9 isn't what they want to do, that they want to change -- and I
10 am sorry to go on, Your Honor.

11 THE COURT: And I appreciate that thought, that
12 position. But ultimately, I have thought about this, I have
13 looked at this, and I am most comfortable with going about this
14 in the way that I have proposed.

15 MR. DAVISSON: May I be heard, Your Honor, just
16 briefly, and make a suggestion?

17 THE COURT: Yes.

18 MR. DAVISSON: The suggestion is instead of close of
19 business today, that, I mean, one of the things I thought of --

20 THE COURT: I need it by close of business. I don't
21 want there to be --

22 MR. DAVISSON: Let me just finish my thought.

23 As I was coming down on the train, thinking about this
24 case and thinking about what was needed in this case, on this
25 issue, it did occur to me that, at the end of the day,

1 notwithstanding all the protestations of my colleague, we
2 really don't and are not seeking an advantage. We didn't cause
3 Mr. Felton's condition. And so really, the stand-in notion by
4 Mr. Monteleone as opposed to this process of, "Here is his
5 report; here is all their complaints about the report," all
6 this back and forth -- which, you know, I have to be honest
7 with the Court, I share -- it's tiresome to keep going back and
8 forth on this issue.

9 I would propose if you give me one extra day, so I could
10 talk to my client, who is in New York -- and I probably can't
11 reach them today. We have a mediation on Monday. If you would
12 allow -- where my client will be present. If you would allow
13 me to talk to my client about this on Monday, Your Honor, I
14 would like to either get them to agree to a stand-in, adopt the
15 report -- that solves their problem. And/or, if my client has
16 a different view, then we will give them the report by close of
17 business on Monday. I am just asking for one more day, Your
18 Honor.

19 THE COURT: I will give you one more day, but that
20 will take us to Saturday. To the extent at this point it's
21 five o'clock in New York and who knows, with the Pope being in
22 New York, if anyone went to work. But I will give you to
23 tomorrow at 5:00 p.m., and then you can make your decision.
24 You will have sufficient time to contact your client and you
25 can discuss this. But I want to avoid any further claims that

1 somehow or another this report was doctored, although I expect
2 that still would be a possibility.

3 MR. GOLDFARB: And if --

4 THE COURT: I mean a possibility that the Plaintiffs
5 would claim.

6 MR. DAVISSON: Your Honor, I have nothing do with
7 drafting this report one way or the other. My partner was
8 handling that. I don't know the details of this report. But I
9 can assure you we are not going to doctor this report, whatever
10 that means. I can assure you that I am not going to change the
11 report. I can assure you that I am not going to address the
12 Court in that fashion in any way, shape, or form.

13 THE COURT: All right.

14 MR. GOLDFARB: The issue about the notion of a
15 stand-in, just so that we are clear on this, from our
16 standpoint, that is someone that is going to adopt in full
17 Mr. Felton's opinions and reports and his deposition testimony.
18 And so our prospect of what would happen in that instance would
19 be we would get whatever information on the qualifications and
20 work of this expert; we would file our motions in limine on the
21 13th or 14th -- whatever that date is -- and I presume that we
22 would treat it just like it was -- whether it was Mr. Felton or
23 Mr. Monteleone, the issues apply.

24 So from our perspective, we would be moving to preclude
25 the opinions and testimony that are contrary to the *Daubert*

1 report and contrary to the summary judgment opinion of the
2 Court, and then and only then would we want to go forward with
3 a deposition of the witness relating to qualifications and a
4 potential additional *Daubert* motion. So I just wanted to put
5 that out there.

6 MR. DAVISSON: Your Honor, notwithstanding the fact
7 that my offer has apparently not been well-received, the
8 reality is that a substitute expert -- assuming perfect due
9 diligence and assuming all other factors were complied with, a
10 substitute expert cannot just parrot the information provided
11 because every person, every human being, expresses themselves in
12 a different way.

13 So when these suggestions are made that they can't deviate
14 from the script, it's hard for me to understand how that works
15 exactly in the real world.

16 THE COURT: I have a hard time as well.

17 But ultimately, what I do know is we have 13 opinions that
18 were rendered. We have a *Daubert* order that addresses a number
19 of these opinions. And at this point, the defense is seeking
20 to provide a substitute expert with opinions.

21 What I am saying is, to the extent that this expert
22 essentially adopts the opinions of Mr. Felton, then we are
23 fine. We should have no problem. To the extent he deviates,
24 then it is a problem because then, now, we essentially have
25 another bite at the apple, and the Court doesn't believe that

1 that's fair, particularly in view of the concerns regarding
2 lack of diligence.

3 And so all we need at this point to assist us to move
4 forward is the report of the substitute expert so that then the
5 Plaintiffs can compare those opinions with the ones that have
6 been previously furnished. To the extent that the Plaintiff is
7 in a position to identify new opinions that are markedly,
8 substantially, significantly, in a meaningful way, different,
9 then we will have a problem. And then at that point, then we
10 will have a situation where the Plaintiff can point to that as
11 creating likely prejudice or problems. And so, in my view,
12 this is a commonsense way to try to sort this out at this
13 point.

14 MR. DAVISSON: I understand the solution, Your Honor.
15 I was just trying to cut to it and make a proposal that I
16 thought the other side could live with. But if that's how you
17 want to proceed, I am more than happy to proceed that way.

18 THE COURT: If there's something that you work out
19 with opposing counsel other than this proposal, then, please, I
20 invite you, I encourage you, to come to another type of
21 accommodation or solution.

22 MR. DAVISSON: That's what I was trying to do, Your
23 Honor, and that's why I wanted to talk to my client because I
24 can't do this without permission.

25 THE COURT: Let me ask you. Is there some reason

1 that you couldn't do this between now and tomorrow by close of
2 business?

3 MR. DAVISSON: I just don't know if I am going to
4 reach the people I need to reach between now and tomorrow. I
5 can certainly try. I have their cell phones. I am not
6 suggesting I wouldn't try to reach them. I probably would be
7 able to reach them. I know they are flying out here on Sunday
8 to go to the mediation on Monday; therefore, I know I will be
9 seeing them.

10 THE COURT: Let me ask you. Would there be any
11 problem if this order were to permit this report to be
12 furnished to you by Monday?

13 MR. GOLDFARB: To be honest, we are going to mediate.
14 Would we would like the order, in any event, in this is the
15 stand-in or not --

16 THE COURT: The opinion, you mean?

17 MR. GOLDFARB: Yeah. If we find out -- if it
18 demonstrates -- I have to say this, because I read again the
19 reply brief, which we had no ability to respond to yet. And on
20 the last page, one of the arguments is that the Court has not
21 yet excluded any of Mr. Felton's opinions regarding National
22 Union's intent.

23 And it's important to say this because they put that in
24 there, but the reason the Court hasn't excluded those is
25 because Mr. Felton hasn't given any opinions regarding intent.

1 In his deposition, he disclaimed giving any opinions regarding
2 intent. And so what we have here is National Union, throughout
3 this four-and-a-half-month process, wants to move away from
4 someone giving opinions regarding claims handling and bad
5 faith, and now they want to have an expert who is going to give
6 opinions bearing on the issue of intent and state of mind, a
7 completely different topic that Mr. Felton disclaimed in his
8 deposition. And so, yes, the report, the opinions, whatever it
9 is that he has, are simply going to demonstrate that.

10 What I was pointing out and what Mr. Davisson is talking
11 about is simply, from the beginning, we have said, "Look, we
12 are not trying to disadvantage you. If you want someone who is
13 simply going to adopt what Mr. Felton has and put you in
14 exactly the same position you would be in if Mr. Felton was
15 standing here healthy today" -- we didn't have a problem with
16 it.

17 But now, honestly, we have spent over \$100,000 briefing
18 this issue back and forth because National Union didn't want to
19 agree to that back in April. So we are prejudiced in that
20 regard. We are prejudiced in spending all of our time the last
21 four months.

22 And I do appreciate the Court's wanting to see that and
23 get to the bottom of it to make a decision, and we are willing
24 to wait to Monday to see what happened in order to move the
25 ball forward.

1 MR. DAVISSON: Your Honor, I cannot believe that
2 representation has just been made to this Court, and I'll tell
3 you why.

4 THE COURT: You know what --

5 MR. DAVISSON: It is an ad hominem argument, first of
6 all, like we are trying to set them up, which is not true.

7 There's correspondence I just read on the train. There's
8 e-mails, which I read on the way down here, which are replete
9 with us telling them we are just trying to get a new expert who
10 will substantially adopt Felton's report, recognizing that you
11 cannot parrot verbatim what the man has said because everybody
12 talks differently.

13 THE COURT: I don't think anyone would dispute that
14 you can't parrot what someone else says, the selection of
15 words. But that's not what we are talking about here.

16 We are talking about 13 particular opinions and a court
17 order that addresses a number of those opinions, so it leaves a
18 number of opinions unscathed and available to utilize. And
19 then we have a new substitute expert, who now has taken a look
20 at what we have and has rendered his opinions.

21 To the extent that they parrot or they mirror or they are
22 basically the same as the opinions themselves, the basic
23 opinions, like I said, we don't have a problem. But to the
24 extent that we now have new opinions, that's different than
25 talking about, "Well, you are not going to be able to use the

1 exact same words; you are not going to be able to parrot the
2 same terms." I realize that. Everybody appreciates that. But
3 what we do need is a mirroring of the opinions that are still
4 left intact.

5 MR. DAVISSON: I understand that. I am not arguing
6 that point, Your Honor. What I am arguing about is this
7 nonsense that he wanted to compromise. I just looked at his
8 letter on the way down here. He did not want to compromise.

9 THE COURT: The last time we were here, the Court
10 made an observation about what this Court has been presented
11 with and how, for whatever reasons, there is a gulf, there is a
12 divide, and it is one that hasn't helped move this case
13 forward. This is yet another example of this divide that
14 exists that prevents the parties from working.

15 I am hoping that, after this hearing, that you can erase
16 what has been said during this hearing and just look forward to
17 the mediation on Monday. Because rather than at the last
18 second have both of you with angst and anger and feelings of
19 disgust for the other side -- that's not going to lend itself
20 to a productive mediation on Monday.

21 MR. DAVISSON: Understood, Your Honor. But there's
22 eight and a half million reasons that they are doing this
23 because they are building their damage case by spinning
24 attorney's fees because they get some portion of their fees
25 under *Brandt*, per the judge's ruling.

1 THE COURT: See? And you just didn't listen to me.
2 I am asking you to erase that in this moment. You can put that
3 back in your brain come Tuesday. But at this point, I would
4 like for you all to make mediation meaningful and as productive
5 as possible.

6 MR. DAVISSON: It will be meaningful, and we will
7 work hard to get the case resolved, Your Honor.

8 THE COURT: I appreciate that.

9 MR. GOLDFARB: As will we, Your Honor.

10 THE COURT: Thank you all.

11 So at this point, I will give you until Monday morning,
12 then, to provide that in the event that you wish to go that
13 route.

14 MR. DAVISSON: Thank you, Your Honor.

15 THE COURT: Good luck on Monday.

16 MR. GOLDFARB: Thank you, Judge.

17 MS. SINGH: Just to clarify, Your Honor, we then have
18 two weeks after Monday to get back to the Court in a briefing?

19 THE COURT: Yes. And then I will issue a follow-up
20 order after I receive that as to what we will do next.

21 MR. GOLDFARB: Thank you, Your Honor.

22 MS. SINGH: Thank you, Your Honor.

23 (End of proceedings at 1:56 p.m.)

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25

C-E-R-T-I-F-I-C-A-T-I-O-N

I hereby certify that I am a duly appointed, qualified and acting official Court Reporter for the United States District Court; that the foregoing is a true and correct transcript of the proceedings had in the aforementioned cause; that said transcript is a true and correct transcription of my stenographic notes; and that the format used herein complies with rules and requirements of the United States Judicial Conference.

DATED: September 25, 2015, at San Diego, California.

/s/ Chari L. Possell

Chari L. Possell
CSR No. 9944, RPR, CRR